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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91222878
Party	Defendant Quality Fresh Farms, Inc.
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Quality Fresh's undisputed facts. For these reasons, and as discussed in further detail below, Quality Fresh's Motion for Summary Judgment should be granted.

II. DISCUSSION

A. Analysis of Other *Dupont* Factors is Unnecessary to Rule on Applicant's Motion

Wonderful Citrus contends that an analysis of the various *Dupont* factors is necessary for the Board to rule on Quality Fresh's Motion. Opposition, p. 2, 1st para. However, in this case, because the single *Dupont* factor of the dissimilarity of the marks is dispositive of the issue of likelihood of confusion, analysis of the other *Dupont* Factors is unnecessary. *See e.g., Missiontrek Ltd. Co. v. Onfolio, Inc.*, 80 U.S.P.Q.2d 1381 (TTAB 2005), stating "the single *DuPont* factor of the dissimilarity of the marks in their entirety substantially outweighs any other relevant facts and is dispositive..." citing *Champagne Louis Roederer S.A. v. Delicato Vineyards*, 148 F.3d 1373, 47 U.S.P.Q.2d 1459 (Fed. Cir. 1998) and *Kellogg Co. v. Pack'em Enterprises, Inc.*, 14 U.S.P.Q.2d 1545 (TTAB 1990), *aff'd*, 951 F.2d 330, 21 U.S.P.Q.2d 1142 (Fed. Cir. 1991). For the purposes of this summary judgment motion, Quality Fresh maintains that even if all other relevant *Dupont* factors are in Opposer's favor (save for the nature and extent of actual confusion, to which Opposer does not dispute that there is none [UMF No. 10; *see* Opposition, p. 7, section 1.B.]), the dissimilarities of the marks are so great that confusion is not possible, and Quality Fresh is entitled to judgment as a matter of law. Thus, an analysis of the other *Dupont* factors is not necessary.

B. The Marks Are So Highly Dissimilar There Can Be No Confusion

In considering the dissimilarities of the marks, Opposer's discussion of the "eyeball" test is well-taken, at least with regard to the appearance of the marks. *See* 4 McCarthy on Trademarks

and Unfair Competition, § 23:25 (4th Ed., Mar. 2016 Update), stating “[s]imilarity of appearance between marks is really nothing more than a subjective ‘eyeball’ test” (emphasis added). Even so, it is appropriate to give greater weight to the dominant parts of a mark, because the dominant parts will make the greatest impression on the ordinary buyer. *Id.* at § 23:42.

In a word-design composite mark, “the word is normally accorded greater weight because it would likely be used by purchasers to request the goods or services.” *In re 1st USA Realty Professionals, Inc.*, 84 U.S.P.Q.2d 1581 (T.T.A.B. 2007); *see also Joel Gott Wines, LLC v. Rehoboth Von Gott, Inc.*, 107 U.S.P.Q.2d 1424, 1431 (T.T.A.B. 2013), *L.C. Licensing, Inc. v. Cary Berman*, 86 U.S.P.Q.2d 1883 (T.T.A.B. 2008), *M.C.I. Foods, Inc. v. Brady Bunte Brady Bunte v. M.C.I. Foods, Inc.*, 96 U.S.P.Q.2d 1544, 1551 (T.T.A.B. 2010). Here, the Wonderful Citrus Mark contains the words “PARAMOUNT CITRUS,” with “PARAMOUNT” in bold, capitalized and spaced out letters that define the outer boundaries of the width of the mark, and “CITRUS” below, in a stylized font. The word “PARAMOUNT” is the dominant feature of the mark because consumers would likely request Wonderful Citrus’ goods by asking for Paramount citrus fruits, Paramount oranges, Paramount lemons, etc. In contrast, the literal elements “PARAMOUNT” and “CITRUS” are not contained in any form in Quality Fresh’s Mark. Instead, the literal element in Quality Fresh’s Mark is the letter Q.

Opposer argues, without presenting any evidence, that consumers would be hard pressed to see the “Q” in Quality Fresh’s Mark. Applicant disagrees. Whether consumers would or would not see the Q is not material to the analysis here. Instead, what is material, is that Wonderful Citrus’ Mark contains the words “PARAMOUNT CITRUS” and Quality Fresh’s Mark does not contain a

literal element having any similarities to either “PARAMOUNT” or “CITRUS.”

Moreover, the similarity of marks are not judged solely on appearance - the sound, connotation and commercial impression must also be considered. *In re E.I. Dupont DeNemours & Co.*, 476 F.2d 1357, 1361 (CCPA 1973). Here, the sound of the marks are completely different. “PARAMOUNT CITRUS” sounds nothing like “Q.” However, even if one were to assume that consumers would not see the “Q” in the Quality Fresh Mark, which Applicant does not concede, at worst, the Quality Fresh Mark has no sound, which, most obviously, sounds nothing like “PARAMOUNT CITRUS.”

In its Opposition, Wonderful Citrus provides examples of marks, which, while containing differences, were held to be confusingly similar, at least in part, because the marks were found to give the same overall commercial impressions. Specifically, (1) *In re Triple R Mfg. Corp.*, 168 U.S.P.Q. 447 (T.T.A.B. 1970) – a humanized tear drop; (2) *In re Calgon Corp.*, 435 F.2d 596 (C.C.P.A. 1971) – a silhouette of a girl in a bathtub; (3) *Copy Cat v. Task Printing*, 908 F. Supp. 37 (D. Mass. 1995) – a British bobby cop; (4) *Penguin Nooks, Ltd. v. Eberhard*, 48 U.S.P.Q.2d 1280 (T.T.A.B. 1998) – a penguin; (5) *Westinghouse Elec. Corp. v. PEK, Inc.*, 184 U.S.P.Q. 559 (T.T.A.B.1974) – a “W” in a circle, which the Board described as three peaks capped by large circles within a circular design; (6) *Time Warner Entertainment Company*, 65 U.S.P.Q.2D 1650 (T.T.A.B. 2002) – a roadrunner bird; (7) *Ava Enterprises, Inc. v. Audio Boss USA, Inc.*, 77 U.S.P.Q.2D 1783 (T.T.A.B. 2006) – BOSS and BSS (with a circle resembling an “O” around the “B”), both accompanied by the word “AUDIO.” Wonderful Citrus contends that, like the marks in the above cases, the marks at issue here “connote the same commercial impression.” Opposition, p. 7, 1st para.

However, Wonderful Citrus fails to articulate what that commercial impression is, except to say that “both marks are circular in nature” and “both marks utilize leaves at the base of the image.” Opposition, p. 3, last para. Based on these purported similarities, Wonderful Citrus then concludes “of the three basic design elements of the Quality Fresh image – namely land, sun/sky and leaves - two are identical to the Paramount Citrus design (the circle and the leaves).” Id.

Putting aside the fact that “identical” is a mischaracterization, Wonderful Citrus conveniently ignores not only the “Q” design element in the Quality Fresh Mark, but the lines, both straight and curved, emanating from the inner “sun” portion of the Quality Fresh Mark, which, by Wonderful Citrus’ own account, connotes land, sun and sky. Opposition, p. 3, last para. In contrast, the impression given by a depiction of an orange (or other piece of citrus fruit) along with the word “CITRUS” is unmistakable. The Paramount Mark connotes citrus fruits, and not land, sky and sun. UMF Nos. 7-9. Quality Fresh’s Mark containing land, sun, sky and leaves connotes a farm field, not a piece of citrus fruit. The commercial impressions of the marks are widely different, and thus, contrary to Wonderful Citrus’ claim, two of the three basic design elements of the Quality Fresh Mark are not “identical” to the Wonderful Citrus mark. For these reasons, the argument that the marks give the same commercial impression lacks merit.

Thus, as to the appearance, sound, connotation and commercial impressions of the two marks, if “[a]ll one can say is ‘I know it when I see it,’” in this case, one can only say, “I do not see it.”

C. No Additional Discovery is Needed Because Opposer Has Responded to the Issue of the Dissimilarity of the Marks

The Opposition asserts that Quality Fresh’s Motion for Summary Judgment should be denied

or postponed to allow Wonderful Citrus to obtain additional discovery to effectively oppose the Motion. Opposition, p. 2, 1st and 2nd paras. However, Wonderful Citrus' discovery is unnecessary. None of Opposer's discovery requests, served on the last day of the discovery period, are directed toward the issue of similarity of the marks. See Opposition, pp. 9-10; Declaration of Michael Vasseghi, ¶ 2, Ex. 1. Opposer has responded substantively to the limited issue of the dissimilarity of the marks, and thus, there is no need for additional discovery prior to ruling on the instant motion.

III. CONCLUSION

In summary, it is undisputed that the appearances, sounds, connotations and commercial impressions of the Quality Fresh Mark and the Wonderful Citrus Mark are simply too great for confusion to occur. Further proceedings would only waste the Board's and the parties' resources. Applicant therefore requests summary judgment in its favor and dismissal of the opposition with prejudice.

Respectfully submitted,

Dated: May 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Quality Fresh Farms, Inc.'s Reply to Opposer Wonderful Citrus LLC's Opposition to Motion for Summary Judgment to Application Serial No. 86/375,060, in re: Quality Fresh Farms, Inc.'s Q + Design mark, was forwarded by First Class Mail delivery, by depositing the same with the United States Postal Service on this 25th day of May, 2016, to the attorney for Applicant at the following address:

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/Naji Alshikhaiti/
NAJI ALSHIKHAITI

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this Quality Fresh Farms, Inc.'s Reply to Opposer Wonderful Citrus LLC's Opposition to Motion for Summary Judgment to registration of the mark in Application Serial No. 86/375,060, in re: Quality Fresh Farms, Inc.'s Q + Design mark, is being filed electronically today, May 25, 2016, on the Electronic System for Trademark Trials and Appeals for the United States Patent and Trademark Office.

/Sherrie M. Flynn/

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